

Judge Coughenour

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

GLEN SCOTT MILNER,

Plaintiff.

V.

UNITED STATES DEPARTMENT OF THE
NAVY,

Defendant,

No. CV-06-1301-JCC

Noted for December 6, 2011

NOTICE OF SUPPLEMENTAL AUTHORITY

On December 31, 2011, the President signed into law H.R. 1540, the National Defense Authorization Act for Fiscal Year 2012 (the “Act”). Section 1091 of the Act (attached) amends Chapter 3 of Title 10, United States Code, to create a new section 130e, permitting the Secretary of Defense, in accordance with Exemption Three of the FOIA, *see* 5 U.S.C. § 552(b)(3), to exempt “Department of Defense critical infrastructure security information,” from the Freedom of Information Act (the “FOIA”). Department of Defense critical infrastructure security information is more specifically defined in the Act as:

[S]ensitive but unclassified information that, if disclosed, would reveal vulnerabilities in Department of Defense Critical Infrastructure that if exploited, would likely result in the significant disruption, destruction, or damage of or to

1 Department of Defense operations, property, or facilities, including information
 2 regarding the securing and safeguarding of explosives, hazardous chemicals or
 3 pipelines related to critical infrastructure or protected systems owned or operated
 4 by or on behalf of the Department of Defense, including vulnerability assessments
 5 prepared by or on behalf of the Department of Defense, explosives safety
 6 information (including storage and handling), and other site-specific information
 7 on or relating to installation security.

8 10 U.S.C. § 130e(c).

9 As relevant to this case, the definition of critical infrastructure security information
 10 specifically includes “information regarding the securing and safeguarding of explosives . . .
 11 including vulnerability assessments prepared by or on behalf of the Department of Defense,
 12 explosives safety information (including storage and handling), and other site-specific
 13 information on or relating to installation security. *Id.* That said, section 130e is not self-
 14 executing. It operates to trigger Exemption Three of the FOIA only if the Secretary of Defense
 15 (or upon delegation of this authority, the Director of Administration and Management) makes a
 16 written finding to the effect that:

- 17 (1) The records in question constitute Department of Defense critical infrastructure
 18 security information; and
- 19 (2) The public interest consideration in the disclosure of such information does not
 20 outweigh preventing the disclosure of such information.

21 10 U.S.C. § 130e(a).

22 The Navy hereby gives notice that it has begun an administrative process to seek such a
 23 finding from the Secretary of Defense (or the Director of Administration and Management), so
 24 that the ESQD information at issue in this case may be exempted under Exemption Three of the
 25 FOIA, 5 U.S.C. § 552(b)(3). The Navy estimates that the administrative process should be
 26 completed within the next sixty days. In the event that the Navy is successful in obtaining such
 27 a finding, it will then seek leave to supplement its pleadings to invoke Exemption Three as an
 28 additional basis for withholding the ESQD information at issue in this case.

1 DATED this 17th day of January, 2012.

2 Respectfully submitted,

3 JENNY C. DURKEN
4 United States Attorney

5 */s/ Peter A. Winn* _____
6 PETER A. WINN
7 Assistant United States Attorney

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this date I electronically filed the foregoing Notice of Supplemental Authority with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following CM/ECF participants:

David Mann
Gendler & Mann
1424 Fourth Ave., Suite 1015
Seattle, WA 98101
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DATED December 17, 2012.

s/Peter Winn
Peter A. Winn
E-mail: peter.winn2@usdoj.gov